IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE, CIVIL JURISDICTION

FIRST APPEAL NO.558 OF 1989

Shri G.D. Khedekar,
carrying on business
at G-4, Ambewadi,Girgaum,
Mumbai-400004. .. ***Appellant***
(Orig. Defendant)

Versus

M/s.Bombay Spectacles *a*
Partnership Firm registered
under the Indian Partnership
Act and carrying on business
at G-4, Ambewadi, Girgaum,
Bombay-400004 .. ***Respondents***
(Orig. Plaintiffs)

Mr.Rahul Kate for the Appellant
Ms.Sheela Balsari for the Respondents

CORAM : S.R.SATHE,J.
DATED : 24/08/2007

ORAL JUDGEMENT :-

1. The Appellant-original defendant in suit No.2278 of 1963 has preferred this appeal against the judgement and order passed by the Court of Second Additional Principal Judge, City Civil Court, Bombay whereby Plaintiffs' suit for possession of the suit premises and recovery of compensation amount was granted in Plaintiffs' favour. For the sake of

convenience hereafter the parties shall be referred to as 'Plaintiffs' and the 'defendant'.

2. The brief facts giving rise to this appeal are as under :-

The suit premises i.e. Shop No.G-4 situated at Ambewadi, Girgaum, Bombay-400 004, consisting of one room admeasuring 27'6" X 8'6" in which there was a small wooden cabin admeasuring 4'6" x 4'3" erected in the rear portion of the said room was in possession of the Plaintiffs' partnership firm as a tenant. In the first week of September, 1959 the defendant approached the Plaintiff and requested to allow him to carry on his tailoring business in the said cabin. Accordingly, Defendant started using the said cabin as licensee of Plaintiffs from 11/09/1959 at a compensation or license fee of Rs.45/- per month. In the year 1962, Plaintiffs decided to convert the said rear portion into a dark room. Plaintiffs, therefore, asked the defendant to hand over the possession of the cabin. The defendant requested to grant time till 31/03/1963. Plaintiffs were pleased to grant time accordingly. The defendant had requested Plaintiffs to permit him to use the old

bench which he wanted to place outside the rear door of the wooden cabin for his customers. Plaintiff had given such permission. However, the landlord of the suit building objected for keeping the bench at the said place. Plaintiffs, therefore, removed the same as the defendant had refused to remove it.

3. On 16/03/1963, Plaintiffs noticed that the defendant had closed the right hand flap of the rear door of the shop premises and had put a lock thereon. The keys of the same were with both the parties i.e. Plaintiffs and defendant. The arrangement of the said door was such that the space between the left hand side of the outer door and inside door of expanded metal could be used by the Plaintiff. On 17/03/1963, Plaintiffs found that the defendant had wrongfully removed the outer lock and put on new lock on the rear door thereby preventing Plaintiffs' entry through the left hand flap of the rear door. Not only that but the Plaintiff noticed that the defendant had placed a sewing machine and table in the said open space on the rear side. On that count the dispute arose between the Plaintiffs and defendant. Thereafter, Plaintiffs

received letter dated 17/03/1963, 19/03/1963 and 20/03/1963 from defendant wherein he had alleged that he was in possession of the said cabin and space as subtenant of the Plaintiffs. He also alleged that he was using the open space out side the inner door of the expanded metal since beginning. He had further stated that he is in such occupation from 20/03/1959. As a result of this, Plaintiffs terminated the leave and license granted to the defendant and called upon him to remove himself and all his belongings from the suit cabin as well as from the open space outside the inner door. Inspite of the termination of the license, the defendant did not vacate the premises. Hence, Plaintiffs filed the present suit and also claimed the arrears of compensation. According to Plaintiffs, defendant was liable to pay compensation for the wooden cabin at the rate of Rs.50/- per month from 01/04/1963 and thereafter at the rate of Rs.3/- per day. The Plaintiffs, therefore, prayed that the defendant be directed to remove himself and/or his belongings from the wooden cabin and to deliver vacant and peaceful possession thereof to the Plaintiffs.

4. The defendant filed his Written Statement on 11/09/1963 and opposed the suit claim. He contended that he was not aware whether the Plaintiff is partnership firm. He, however, contended that Plaintiffs should prove that the Plaintiff is a registered partnership firm. Secondly, the defendant contended that he is subtenant in respect of the wooden cabin and adjoining open portion between the expanded metal door and the outer wooden door. According to him, the expanded metal door was locked by the Plaintiffs from their side and defendant had locked the said door from his side. The defendant also denied that there were duplicate keys with the parties as a result of which Plaintiff could use the rear portion. The defendants specifically contended that suit premises were occupied by him as subtenant since 29/03/1959 and at that time, he had deposited amount of Rs.100/- with Plaintiffs for creating subtenancy in his favour. After the time, he took the possession of the cabin, he locked the metal door from his side and was in exclusive possession and occupation of the cabin. He was also paying Rs.45/- per month regularly and carrying on his tailoring business in the said cabin

since 26/03/1959. The defendant also denied that Plaintiff had asked him in July-1962 to vacate the premises and that at that time, he asked the Plaintiff to permit him to use the premises till 31/03/1963. He also denied Plaintiffs' case with regard to giving permission to use the bench. On the contrary, it is his contention that the bench was in existence in the suit premises since the time subtenancy was created in his favour i.e. from 20/03/1959. He further contended that Plaintiffs illegally and unauthorizedly without his permission removed the said bench. According to defendant, Plaintiff had no right to ask the defendant to hand over the possession and claim arrears of compensation of Rs.1,040/- as mentioned in the plaint. Hence, on all these grounds the defendant prayed for the dismissal of the suit.

5. As the defendant had contended in his Written Statement that the suit premises has been subleased to him on 20/03/1959 and that he has become a lawful subtenant. Plaintiffs amended the plaint by introducing para-10A and pointed out that defendant had filed application No.RAN application No.1152/RES of 1963

against Plaintiffs in the Court of Small Causes at Bombay under section 24 of the Bombay Rent, Hotel and Lodging House Rates Control Act (for the sake convenience hereinafter referred to as the Bombay Rent Act.) for restoration of electricity to the suit premises by contending that he is a lawful subtenant of the Plaintiffs in the suit premises. The said application was opposed by the Plaintiffs. The Small Causes Court recorded evidence in the said application on the issue whether the defendant was the lawful subtenant and the said Court held that the defendant was licensee and not a subtenant and accordingly, rejected the application on 10/12/1963. The defendant challenged the said order in Revision Application No.60 of 1964. However, the same was also dismissed by the Appellate Bench of the Small Causes Court on 12/08/1969. The Plaintiffs, therefore, alleged that the issue as to whether the defendant is lawful subtenant or not has been finally decided by the Small Causes Court under the Bombay Rent Act and the said issue can not be raised in the present suit and the same is barred by res-judicata and by principle anologus to res-judicata.

6. The defendant filed his additional Written Statement to the amended plaint and admitted that he had filed such application and revision. The defendant contended that as the Plaintiffs had not admitted the relationship of landlord and tenant between the present defendant and Plaintiffs, Small Causes Court rejected the application. However, as main application was only for restoration of electricity supply, the issue with regard to subtenancy was not directly and substantially in issue in the said application. Issue decided with regard to subtenancy in the said proceedings by the Small Causes Court is not binding on the defendant. Defendant also contended that the finding recorded by the Small Causes Court was not in a suit but it was given in an application and as such, the said issue can not be said to be barred by principle of res-judicata.

7. On these pleadings, the learned Trial Judge framed in all 8 issues. Both the learned Advocates submitted to the Court to try issue Nos.1 and 8 i.e. issues regarding registration of Plaintiffs' partnership firm and res-judicata as a preliminary

issue. Plaintiffs examined Jaswantlal Multani one of the partner of the Plaintiffs' firm and produced certain documents. This evidence was adduced only to the extent of preliminary issue by reserving right to adduce additional evidence. The said witness was cross-examined by the defendant's advocate. The defendant did not adduce any evidence at that stage.

8. After hearing the arguments of both the learned Advocates, the learned Trial Judge came to the conclusion that the Plaintiffs have proved that Plaintiff is a registered partnership firm and the issue with regard to the tenancy is finally decided by the Appellate Bench of Small Causes Court and the said finding is binding on the present defendant and it operates as res-judicata. The learned Trial Judge also held that defendant was not entitled to raise the same issue again in the present suit. Having come to such conclusion and finding that the other issues can also be decided without any further evidence, the learned Trial Judge recorded his finding on all the issues and directed the defendant to remove himself and all his belongings, articles from the suit premises namely

wooden cabin and open space described in prayer clause (a) and (b) and also passed order regarding payment of compensation.

9. Being aggrieved by the above mentioned order, the defendant has filed the present appeal. In this appeal before me, Shri Rahul Kate, learned Advocate for the defendant has urged only two points. Firstly, he submitted that the learned Trial Judge has wrongly held that the finding of the Small Causes Court to the effect that defendant is not a lawful subtenant is binding on the defendant and that it operates as res-judicata. Secondly, he canvassed before me that defendant had become a lawful subtenant and as such suit ought to have been filed in the Small Causes Court. As against this, Smt. Balsari, learned Advocate for the Respondent-original Plaintiff supported the judgement and order passed by the Trial Judge and submitted that the issue with regard to subtenancy was finally decided in the earlier proceedings wherein the said issue was not only ancillary but was main issue on which the fate of application filed under section-24 of the Bombay Rent Act was dependant and as such, the

learned Trial Judge was justified in holding that the issue with regard to subtenancy is barred by principle of res-judicata. She, therefore, submitted that the appeal be dismissed.

10. It is not in dispute that the defendant had filed an application bearing No.1152/1963 under section-24 of the Bombay Rent Act for restoration of the Electric Supply to the suit premises. Admittedly, the said application was strongly opposed by the present Plaintiff on the ground that the defendant had in fact no locus standi to file such application as he was not a tenant. Both the parties adduced evidence in detail to prove their respective stand. It was contended on behalf of the defendant that he entered the suit premises as a licensee of Plaintiff in March-1959 and as such, he was a protected sub-tenant. After considering the evidence, the learned Judge, Small Causes Court, Mumbai recorded following findings :-

> ***"(i) The applicant entered the premises by the month of September-1959 and not before that ;***

(ii) The applicant's (present defendant's) possession of the cabin can not at all be said to be exclusive and to the exclusion of the respondents (present plaintiffs);

(iii) The otla could not be in the exclusive possession of the applicant (present defendant);

(iv) What was given to the applicant (defendant) was not the actual possession of the interest in the property, but merely the right of the user;

(v) The facts and circumstances go to show that what was given to the applicant was the cabin and that too as a licensee from September-1959 and not before ;

(vi) Alternatively, even if the sub-tenancy was created in favour of the applicant, still it was only from the month of September-1959 and such sub-tenancies are prohibited by section 15(1)

of the Rent Control Act and the applicant can not get relief in that proceedings and consequently the applicant fails."

11. The defendant challenged the order of dismissal of the said application in Civil Revision Application No.60 of 1964 and the Appellate Bench of the Small Causes Court dismissed the said Revision by order dated 12/08/1969. Admittedly, the defendant did not challenge the said order before the Superior Court and thus, it became final. So, one thing is certain that when the application under section-24 of the Bombay Rent Act was made by the defendant and the question arose as to whether the defendant is a protected subtenant under the Bombay Rent Act. The Court held that the defendant came in the suit premises in September-1959 and he is not a protected sub-tenant and in fact, such sub-tenancy was prohibited by Section-15(i) of the Bombay Rent Act. Admittedly, suit premises was not taken for resident but was occupied for the purposes of business. It was argued on behalf of Plaintiff's Advocate that a Court of Competent Jurisdiction has recorded a finding

that there was no relationship of landlord and tenant as contemplated by the Bombay Rent Act between Plaintiff and defendant and defendant was not a protected sub-tenant and the said finding operates as res-judicata. So, according to him in the instant case, the defendant was not entitled to raise the same issue.

12. In order to find out whether there is substance in the arguments advanced by the learned Advocate for the Plaintiff, it would be worthwhile first to see what Section-11 of the Code of Civil Procedure says. It runs as follows :-

> ***"11. Res judicata - No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been***

subsequently raised, and has been heard and finally decided by such Court.

Explanation I- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II- For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III- The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV- Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter

directly and substantially in issue in such suit.

Explanation V- Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI- Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

{Explanation VII- The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the

decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII- An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent suit, notwithstanding that such Court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.}"

13. Shri Rahul Kate, learned Advocate for the defendant strenuously argued before me that proceedings which were initiated by the defendant in the Small Causes Court Bombay under section-24 of the Bombay Rent Act were in the nature of application and not "suit". Besides this, according to him, in that proceedings the point as to whether the defendant is a tenant or not was not directly and substantially in issue. Issue of defendant's status was only ancillary and as such,

provision of section-11 of CPC can not be attracted in the instant case. In order to answer this point correctly, it would be first necessary to know as to what was the exact provision under which the defendant had initiated proceedings in the Small Causes Court, Bombay. It was an application under section-24 of the Bombay Rent Act. The said section runs as follows :-

> ***"24. Landlord not to cut-off or withhold essential supply or service :- (1) No landlord either himself or through any person acting or purporting to act on his behalf shall without just or sufficient cause cut-off or withhold any essential supply or service enjoyed by the tenant in respect of the premises let to him.***
>
> ***(2) A tenant in occupation of the premises may, if the landlord has contravened the provisions of sub-section (1), make an application to the Court for a direction to restore such supply or service.***

{(2A) Having regard to the circumstances of a particular case the Court, may, if it is satisfied that it is necessary to make an interim order, make such order directing the landlord to restore the essential supply or service before the date specified in such order, before giving notice to the landlord of the enquiry to be made in the application under sub-section(3) or during the pendency of such enquiry. On the failure of the landlord to comply with such interim order of the Court, the landlord shall be liable to the same penalty as is provided for in sub-section(3)}

(3) If the Court on enquiry finds that the tenant has been in enjoyment of the essential supply or service and that it was cut-off or withheld by the landlord, without just or sufficient cause, the Court shall make an order directing the

landlord to restore such supply or service before a date to be specified in the order. Any landlord who fails to restore the supply or service before the date so specified shall for each day during which the default continues thereafter be liable {upon a further direction by the Court to that effect} to fine which may extend to one hundred rupees.

(4) Any landlord who contravenes the provisions of sub-section (1) shall, on conviction, be punishable with imprisonment for a term which may extend to three months or with fine or with both.

Explanation (I)- In this section essential supply or service includes supply of water, electricity, lights in passages and on staircases, lifts and conservancy or sanitary service.

{Explanation II - For the purposes of this section, withholding any essential supply or service shall include acts or omissions attributable to the landlord on account of which the essential supply or service is cut-off by the local authority or any other competent authority.} "

From the bear reading of this Section, it is very clear that an application under sub-section-2 must be made by a tenant alone. A person who is not a tenant as defined in section 7(15) of the Bombay Rent Act can not make an application under section-24 of the Bombay Rent Act against the landlord. So, before passing any order under section-24 of the Bombay Rent Act, it was obligatory to find out whether an application under section-24 is made by a person who is a 'tenant' under the Bombay Rent Act. When such is the position, I am not inclined to accept the argument advanced by the learned Advocate for the defendant that point with regard to defendant's status was not directly and substantially in issue in the previous application. So, the condition that a person making an application under

section-24 of the Bombay Rent Act must be a tenant, is in fact a sine qua non for making an application.

14. **In Sajjadanashin Sayed V/s. Musa Dadabhai Ummer and Ors. (2000) 3 Supreme Court 350**, the Apex Court has laid down the test to distinguish whether a matter was directly and substantially in issue or was collaterally or incidentally in issue. It has been laid down that in order to decide as to whether the point was directly or substantially in issue in the earlier proceedings one has to consider the facts and circumstances of each case. As pointed out above when the fate of the application was solely dependent on the question as to whether the defendant was a 'tenant' or not ? How it can be said that the said point was not directly or substantially in issue in the earlier proceedings. In the above cited case the Apex Court has in fact specifically observed that there may be a case where the party might not have asked specific relief with regard to that issue. But merely because such specific relief with regard to that issue is not claimed, one can not jump to the conclusion that the said point or

issue was only ancillary and was not strictly or substantially in issue.

15. So, having regard to facts and circumstances of this case and position of law, I am of the view that the Trial Court has rightly observed that the issue with regard to defendant's status was not ancillary issue in the earlier proceedings namely an application under section-24 of the Bombay Rent Act.

16. The learned Advocate for the defendants submitted that Section-11 of the Code of Civil Procedure speaks about the suit and as the earlier proceedings filed by the defendant in Small Causes Court was not a suit but an application, the Provision of Section-11 does not come into play. As against this, Ms.Sheela Balsari learned Advocate for the Plaintiff submitted that even if the earlier proceeding was not a suit that was a proceeding where issue which is now involved in the present suit as to whether the defendant is tenant or not has been finally decided and as such, upon general principle of res judicata the earlier decision determining the status of defendant

operates as res judicata. For this, she has placed reliance on a case **Gulabchand Chhotalal Parikh V/s. State of Gujarat AIR 1965 Supreme Court 1153** In that case, question arose whether decision in earlier Writ Petition on merits was barred upon general principle of res-judicata in subsequent suit involving same question and for same relief and it was held by the Apex Court that the provisions of Section-11 of CPC are not exhaustive with respect to an earlier decision operating as res-judicata between the same parties on the same matter in controversy in a subsequent regular suit and on the general principle of res-judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it will operate as res-judicata in a subsequent regular suit. It was also held that it is not necessary that the Court deciding the matter formerly be competent to decide the subsequent suit or that the former proceeding and the subsequent suit have the same subject-matter and that the nature of the former proceeding is immaterial. So, having regard to

the above decision of the Apex Court one can safely say that in the instant case, the matter in controversy namely status of the defendant was finally decided by Court of Competent Jurisdiction after full opportunity was given to the parties and so it operates as res-judicata.

17. Incidentally, it would be worthwhile to see the observations made by the Apex Court in a case **Gulam Abbas V/s. State of UP AIR 1981 Supreme Court 2198**. In this case, the Supreme Court was pleased to hold that the object of doctrine of res-judicata is to give finality to litigation and that general doctrine of res-judicata is founded on consideration of high public policy to achieve two objectives namely, that there must be a finality to litigation and that individuals should not be harassed twice over with the same kind of litigation. These observations of the Apex Court are very important and pertinent in the instant case. So, in view of these observations and having regard to Section-11 and in particular explanation-VIII, it has to be held that the finding in the earlier proceedings

i.e. application No.1152 of 1963 that defendant is not a tenant under the Bombay Rent Act is conclusive and it operates as res-judicata. So, the defendant was in fact not entitled to agitate the same point again in the present suit. The learned Advocate for the Plaintiff has drawn my attention to a case **Ishwar Dutt V/s. Land Acquisition Collector and another (2005) 7 SCC 190** wherein it was held that the issue decided earlier between the same parties in Writ Petition can not be agitated again in a subsequent suit. So, it can not be said that for application of Section-11 or for application of general principle of res-judicata the earlier proceedings must necessarily be a suit.

18. So, having regard to all the facts and circumstances of the case and the position of law, I have no hesitation to hold that the finding recorded regarding status of the defendant namely that he is not a tenant under the Bombay Rent Act, in the earlier proceedings operates as res-judicata. Once, it is held accordingly, then it is very clear that the decree passed by the Trial Court is legal and valid. Having

once decided that the defendant was not a tenant under the Bombay Rent Act, Plaintiff was justified in filing the suit in the City Civil Court, Bombay. Shri Rahul Kate, learned Advocate for the defendant has laid his hands on a case **Raghunath P. Singhania V/s. Yasin T. Mavany 1998(3) Maharashtra Law Journal 354** wherein this Court (CORAM : S.S. NIJJAR,J.) has held that jurisdiction to entertain and decide rights of parties as to whether or not they are licensees or tenant or whether they are entitled to protection of the Rent Act lies exclusively with the Small Causes Court. I have carefully gone through the said ruling. The facts of the said case and the facts of the case in hand are different. In the instant case, the point that the defendant is not a tenant is already determined by a competent Court. While in the above cited ruling, the said point was yet to be decided. So, the above cited ruling is of no use to the present defendant.

19. The learned Advocate for the defendant has not challenged the decree passed by the Trial Court on any other ground. No other point has been agitated. From

the perusal of the Trial Court judgment, it is very clear that the learned Trial Judge has considered each and every aspect in depth and has rightly held that the Plaintiff has proved the suit claim. The order passed by the Trial Judge is legal and correct. There is no necessity to interfere with the same. In this view of the matter, there is no substance in this appeal. Hence, I pass the following order :-

O R D E R

Appeal is dismissed with costs.

The defendant is granted time till 30/09/2007 to remove himself and all his belongings, articles etc. from the suit premises.

At this stage, the learned Advocate for the Respondent submits that Respondent be allowed to withdraw the amount of compensation deposited by the defendant in the City Civil Court.

As decree passed by the Trial Court is confirmed by this Court permission is granted to the Respondent to withdraw the amount of compensation deposited by the appellant-defendant in the City Civil Court.

(S.R.SATHE,J.)